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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-517

ELISHA COMBS,

Petitioner,

v.

UNITED STATES.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITIONER'S BRIEF

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Petition for Certiorari Filed October 9, 1971
Certiorari Granted January 10, 1972

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REFERENCE TO OPINIONS BY THE COURT BELOW

The decision of the Sixth Circuit Court of Appeals is officially reported as *United States* v. *Combs*, 446 Fed. (2nd) 515. This opinion is reproduced in full beginning at Page 5 of the "Petition for Writ of Certiorari" filed in this Court on October 9, 1971.

The order denying a "Petition for Rehearing" in the Sixth Circuit Court of Appeals appears at Page 9 of the "Petition for Writ of Certiorari" filed in this Court on October 9, 1971.

GROUNDS FOR JURISDICTION

The "Petition for Rehearing" was denied by the Sixth Circuit Court of Appeals by an order entered on September 15th, 1971. The statutory authority for this appeal

is *28 United States Code, § 1254 (1).* On October 9th, 1971, the "Petition for Writ of Certiorari" was docketed in the United States Supreme Court and assigned No. 71-517.

On January 9th, 1972, an order granting the "Petition for Writ of Certiorari" was entered by this Court.

QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals follow *Jones* v. *United States,* 362 U.S. 257 (1960), when it denied standing to challenge a search to the Petitioner when the Petitioner was charged with receiving, possessing and concealing contraband in a Federal Indictment?

STATEMENT OF THE CASE

The Petitioner was indicted by a Federal Grand Jury on a charge that he unlawfully, willfully, and knowingly did receive, possess and conceal certain liquor which had been stolen from Interstate Commerce in violation of *Title 18 U. S. Code, § 659.*

The evidence, twenty-six (26) cases of whiskey, was discovered during a search of a shed on a farm in Hazard, Kentucky, under the color of a search warrant.

The affidavit in support of the search warrant was "clearly insufficient." See: Bottom of Page 3, "Memorandum for the United States in Opposition to Petition for Writ of Certiorari" in the instant case.

Petitioner's standing to challenge the search warrant was not questioned in the proceedings before the District Court Judge.

A "Motion to Suppress the Evidence" because the search warrant was defective, was overruled by the Trial Court Judge.

During the course of the trial on the merits, the Petitioner disclaimed any interest in the premises searched or the property seized.

The Petitioner was found guilty by a jury, and the Court sentenced the Petitioner to two (2) years imprisonment and imposed a fine of Five Thousand ($5,000.00) Dollars.

On appeal to the United States Court of Appeals for the Sixth Circuit, the U. S. Government argued for the first time that Petitioner lacked standing to challenge the search warrant because of his testimony offered during the trial on the merits disclaiming an interest in the premises searched or the property seized.

The Sixth Circuit Court of Appeals accepted the Government's contention that the Defendant lacked standing and affirmed the trial court's judgment of conviction relying upon *Jones* v. *United States,* supra.

The Petitioner sought a rehearing in the Sixth Circuit Court of Appeals which was denied.

On October 9th, 1971, Petitioner filed his "Petition for Writ of Certiorari" in this Court.

On January 9th, 1972, the "Petition for Writ of Certiorari" was granted by this Court.

ARGUMENT

THE SIXTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DENIED STANDING TO THE PETITIONER WHO HAD BEEN INDICTED FOR A CRIME HAVING POSSESSION AS AN ESSENTIAL ELEMENT.

The Petitioner was indicted by a Federal Grand Jury which charged among other things that he unlawfully, willfully, and knowingly did receive, possess, and conceal cer-

tain liquor which had been stolen from Interstate Commerce. See: Appendix, Page 2.

Jones held that when possession of the seized evidence is itself an essential element of the offense with which the Defendant is charged, the Government is precluded from denying that the Defendant has the requisite possessory interest to challenge the admission of the evidence. See: *Simmons* v. *U. S.*, 390 U.S. 377, 390 (1968).

Defendant was charged in an indictment having "possession" as an essential element of the offense.

Therefore, the Government is precluded from denying standing to the Petitioner to challenge the admission of the evidence.

The Government admits that the affidavit for the search warrant was clearly insufficient. The affidavit stated that the "affiant had reasonable grounds from information from an informant that this whiskey was transported to the above described premises." See: Appendix, Page 6. Such an affidavit is fatally defective. See: *Aguilar* v. *Texas*, 378 U.S. 108.

Jones, supra, was interpreted narrowly by the Third Circuit Court of Appeals in *United States* v. *Konigsberg*, 336 Fed. (2nd) 844. The Third Circuit Court of Appeals suggested that when possession is only one of several elements in the crime charged that the Defendant is not automatically conferred standing to attack the validity of a search. In the recent Second Circuit Court of Appeals case, *U. S.* v. *Price*, 447 Fed. (2nd) 23 (July 8th, 1971), the Court collected decisions which have interpreted *Jones* and which have rejected *Konigsberg*.

At Page 28 of the official report, the Court states:

> "The First, Fourth, Fifth and Seventh Circuit have followed *Simmons* in rejecting the limited reading of *Jones*. *United States* v. *Cobb*, 432 Fed. (2nd) 716, (Fourth Circuit 1970); *United States* v. *Allsenberrie*,

424 Fed. (2nd) 1209 (Seventh Circuit, 1970); *Glisson* v. *United States*, 406 Fed. (2nd) 423, 427 (Fifth Circuit, 1969); *Niro* v. *United States*, 388 Fed. (2nd) 536, 535 (First Circuit, 1968)."

The Second Circuit also disposed of the argument advanced by the Government that when testimony at the pre-trial hearing on the "Motion to Suppress" tends to incriminate the Defendant that testimony cannot later be used at the trial in chief.

To that argument the Second Circuit Court of Appeals stated that *Simmons* explicitly re-affirmed the automatic standing of *Jones*. The Second Circuit refused to give the Government the advantage of a conviction based on inconsistent positions which a Defendant may be forced to adopt.

It is significant in the instant case that the Petitioner's standing to attack the validity of the search warrant was not raised during the course of the proceedings before the District Court.

This is unlike the situation which occurred in *Jones*, supra. In *Jones* prior to the trial, the Petitioner duly moved to suppress evidence obtained through the execution of a search warrant on the ground that the warrant had been issued without a showing of probable cause.

The Government challenged the Petitioner's standing to make this motion because Petitioner alleged neither ownership of the articles seized nor an interest in the apartment greater than that of an invitee or guest. The District Court in *Jones* then agreed to take evidence on the issue of Petitioner's standing.

The Petitioner in the instant case never had his standing to challenge the search warrant questioned by the Government.

During the trial in chief, the Petitioner disclaimed in-

terest in the premises searched or the property found as the result of the search. The Government's contention appears to be that the evidence disclosed at the trial somehow relates back to the hearing on the pre-trial "Motion to Suppress Evidence" and denies the Petitioner standing.

Simmons, supra, announced a further rule that any admissions of the Defendant during the course of the pre-trial hearing on the "Motion to Suppress" could not be used against him at the trial in chief.

However, the Government in the instant case seems to argue that admissions made at the trial in chief by the Defendant may somehow be used to deny him standing, after the fact as it were, at the motion for suppression of evidence conducted before the trial in chief. Such a result is not supported by *Simmons*.

CONCLUSION

For the reasons stated herein, Petitoner respectfully requests this Court to vacate the proceedings below to determine that the search warrant is defective and further orders the suppression of the evidence seized under the color of the defective search warrant, and finally a new trial.

Respectfully submitted,

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